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Supreme Court, U.S.
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No. 02-316

IN THE

Supreme Court of the United States

DONALD R. WILD and DIANA H. WILD,

Petitioners,

v.

SUBSCRIPTIONS PLUS, INC.; Y.E.S.! INC. a/k/a YOUTH EMPLOYMENT SERVICES, INC.; KARLEEN HILLERY; CHOAN LANE; JEREMY HOLMES; HEART OF TEXAS DODGE, INC.; SCOTTSDALE INSURANCE COMPANY; ACCEPTANCE INSURANCE COMPANY; PROGRESSIVE NORTHERN INSURANCE COMPANY; ALLSTATE INSURANCE COMPANY; UNIVERSAL UNDERWRITERS INSURANCE COMPANY and MUTUAL FIRE AND AUTOMOBILE INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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QUESTION PRESENTED

Whether 28 U.S.C. § 1406(a) allows the transfer of a case to a transferee court that does *not* have personal jurisdiction over *all* defendants.

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ARGUMENT

I. THE CASE IS NOT MOOT

Respondents argue that this case is moot because petitioners "have not challenged the Seventh Circuit's ruling that jurisdiction exists" and therefore it has been established that "jurisdiction was *not* lacking over *any* of the defendants." (Brief in Opposition for Respondents SPI and Hillery ("Hillery's Opp. Brief") at p. 3; emphasis added).

In other words, SPI and Hillery *now* argue that Hillery *is* subject to the district court's jurisdiction notwithstanding Hillery's request for dismissal (which started this controversy) *and* her inability to appeal the *favorable* ruling she obtained. They go on to state:

> True, the court did not address *Blaski*. But, there was no need to because *Blaski* did not address the very narrow issue that *would* have been before the Seventh Circuit *had jurisdiction in fact been lacking* over Hillery: whether lack of jurisdiction over one of 13 defendants where venue was proper as to all defendants required retransfer.

(Hillery's Opp. Brief at p. 6; emphasis added).

Likewise, Acceptance Insurance Companies, Scottsdale Insurance Company and Progressive Northern Insurance Company incorrectly argue that "[t]he court of appeals determined that the district court had erred in finding no jurisdiction over Hillery." (Brief in Opposition for respondents Acceptance Insurance Companies, Scottsdale Insurance Company and Progressive Northern Insurance Company ("Insurers' Opp. Brief") at p. 3). Respondents are wrong for several reasons.

First, petitioners have *always* argued that "the Wisconsin court never acquired jurisdiction because one defendant, Hillery, is not amenable to process in Wisconsin." (Pet. at p. 11).

Second, the Seventh Circuit did not "rul[e] that jurisdiction [over Hillery] exists . . ." and it did not "determine[] that the district court had erred in finding jurisdiction over Hillery" as claimed by respondents. (Hillery's Opp. Brief at p. 3; Insurers' Opp. Brief at p. 3). In fact, *none* of the respondents appealed to the Seventh Circuit the district court's finding that it lacked jurisdiction over Hillery. What Hillery *did* was that she tried to cure the jurisdictional problem by telling the Seventh Circuit at the appellate stage that she was willing to *submit* to the Seventh Circuit's and the district court's jurisdiction.

In their original appeal brief petitioners asked the Seventh Circuit to decide as a threshold issue whether the district court had acquired jurisdiction over this case. Petitioners argued that the district court *never* acquired jurisdiction over the case because the court had determined that Hillery was not subject to its jurisdiction and, once the district court made that determination, it could proceed no further. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998); *Ex Parte McCardle*, 7 Wall. 506 (1868) (". . . when [jurisdiction] ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause"); *Cook v. Winfrey*, 141 F.3d 322, 325 (7th Cir. 1998) ("It is axiomatic that a federal court must assure itself that it possesses jurisdiction over the subject matter of an action before it can proceed to take any action respecting the merits of the action").

In their response brief, respondents did *not* rebut that argument. Instead, SPI and Hillery *only* claimed that this *jurisdictional* deficiency could be *cured ex post facto* by Hillery's willingness, expressed for the first time in her appeal brief, to submit to the jurisdiction of the appeals and district courts.

Petitioners responded by pointing out that the argument made by SPI and Hillery, that a court's jurisdiction over a case can be made to depend upon a party's *consent* to jurisdiction, had been flatly rejected by the Seventh Circuit and this Court in *Blaski v. Hoffman*, 260 F.2d 317 (7th Cir. 1959), *aff'd*, 363 U.S. 335 (1960). *See also Page v. Wright*, 116 F.2d 449 (7th Cir. 1940); Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure*, §§ 1393, 3844 (2d ed. 1986) (hereinafter cited as "Wright & Miller").

It was *not* surprising that Hillery, after having successfully challenged the district court's jurisdiction over her (and thereby the court's jurisdiction over the case) was *then*, at the appellate level, willing to submit to the court's jurisdiction, since she now knew the district court would also rule in her favor if given a chance. (Pet. App. 36a).

It *was* surprising, however, that Hillery had challenged the district court's jurisdiction in the first place. Hillery has never explained why she did it, or whether she (or her lawyers for that matter) knew that her challenge to the court's jurisdiction over *her* also amounted to a challenge to the jurisdiction over the *entire case*. Regardless of whether she knew that or not—and regardless of whether she filed her jurisdictional challenge to hedge her position just in case the district court ruled against her on the merits of the case- -the net effect of the district court's ruling (which was not challenged by anyone on appeal) was that petitioners were prevented from suing Hillery in the Wisconsin district court. The obvious implication of Hillery's challenge, and of the court's ruling, was a recognition that the district court—as a transferee court—had *never* acquired jurisdiction over the case.

Since Hillery prevailed in her jurisdictional challenge and *established* that the district court *did not have jurisdiction* over

her, at the appellate level she could not—and did not—argue that she was wrongfully dismissed from the case. Instead, still wanting to preserve the favorable ruling SPI (her company) obtained on the merits, she decided to *manufacture jurisdiction* over the case by a declaration that she was *then* willing to *submit* to the jurisdiction of the appeals and district courts. Hillery apparently believed that *she* could decide when and how a court acquires jurisdiction over a case. Fortunately, this Court had already said "no" to that argument.

But, in any event, it is not accurate, as respondents suggest, that *anyone* appealed to the Seventh Circuit the district court's ruling that it lacked jurisdiction over Hillery. And any suggestion that the Seventh Circuit *reversed* the district court's ruling is equally inaccurate.

The Seventh Circuit's opinion (Pet. App. 1a-12a) shows the Court did *not* reverse the district court on *any* issue. Moreover, a reversal would have required the Court to set aside the judgment dismissing Hillery from the case, and that did not happen.

In sum, the district court's decision finding no jurisdiction over Hillery was not appealed and it is *res judicata*, notwithstanding the contrary decision by the Wisconsin state court—a decision that has not been reviewed yet.

II. RESPONDENTS DID NOT WAIVE THEIR CHALLENGE TO THE DISTRICT COURT'S JURISDICTION

Respondents argue that petitioners waived their challenge to the court's jurisdiction over the case. This is not true. If anyone waived anything, it is the respondents, because *they never* presented their waiver argument to the district court. Moreover, although they raised the "waiver" argument *for the first time* in

the appeals court, obviously they lost it. And they cannot raise the argument in this Court because *they* did not seek certiorari review. If anyone waived anything, it is the respondents.

In any event, the "waiver" argument lacks merit. It is hornbook law that a challenge to a court's jurisdiction over a case is *never* waived and can be raised at any time. *American Fire and Casualty Co. v. Finn*, 341 U.S. 6 (1951) (the absence of jurisdiction *at the time of judgment* required the court of appeals to vacate the district court's judgment); *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 ("... if, at the end of the day and case, a *jurisdictional* defect remains uncured, the judgment must be vacated"); *International Union of Operating Engineers v. Rabine*, 161 F.3d 427, 429 (7th Cir. 1998); Fed. R. Civ. P. 12(h)(3); Wright & Miller § 1393.

Moreover, petitioners made their jurisdictional challenge in a timely fashion, at their first opportunity after the district court held that it lacked jurisdiction over Hillery, as required by *National Standard Co. v. Adamkus*, 881 F.2d 352 (7th Cir. 1989) and *Songbyrd v. Estate of Grossman*, 206 F.3d 172 (2d Cir. 2000).

True, petitioners did *not* argue to the Louisiana court (before the transfer) that the Wisconsin court lacked jurisdiction over Hillery. Why? Because petitioners had no reason to believe- -and had no evidence to suggest or prove- -that Hillery was not subject to suit there, and because it is the moving party's burden to show that personal jurisdiction can be exercised in the transferee district. 17 *Moore's Federal Practice* § 111.33 (3d). Moreover, as noted by the Seventh Circuit in *National Standard*, "an order of transfer is not *res judicata*." 881 F.2d at 356. Thus, petitioners did not waive anything by not arguing to the Louisiana court that the Wisconsin court lacked jurisdiction over Hillery.

Thereafter, when the suit arrived in Wisconsin, petitioners still had no reason to believe, and no evidence to support or prove, that Hillery was not subject to that court's jurisdiction. And later, when Hillery filed her motion seeking dismissal for lack of personal jurisdiction- -which was actually a motion for summary judgment filed only three months before the scheduled trial date—petitioners still believed the court had jurisdiction over Hillery. In fact, petitioners filed papers opposing Hillery's motion. In the end, Hillery won and petitioners lost the jurisdictional dispute.

Once the district court issued its Opinion and Order on December 6, 2000 (Pet. App. 20a-52a) petitioners filed a motion for reconsideration. Their motion for reconsideration was still in the court's hands when, on January 5, 2001, petitioners filed their motion for retransfer, at their first opportunity after learning that Hillery was not subject to the court's jurisdiction and after respondents failed to ask for modification of that order. The district court denied the motion for reconsideration on January 8, 2001 and denied the motion for retransfer two days later, on January 10, 2001 (Pet. App. 16a-19a). Petitioners' request for retransfer was certainly timely.

In *In Re Cragar Industries, Inc.*, 706 F.2d 503, 505 (5th Cir. 1983), the Fifth Circuit held that a party may move to retransfer a case "when unanticipatable post-transfer events frustrate the original purpose of the transfer . . ." In our case, Hillery waited until less than four months before trial to challenge the court's jurisdiction over her (and thereby the court's jurisdiction over the case). Petitioners tried to oppose her motion, but the court ruled that Hillery could not be sued in Wisconsin. In light of these changes in circumstances—which were brought about by no one other than Hillery, and which frustrated the original purpose of transfer—petitioners motion to retransfer was filed timely.

Respondents' reliance on *National Standard Co. v. Adamkus*, 881 F.2d 352 (7th Cir. 1989) is misplaced. That case supports petitioners' position and not the respondents' arguments:

> . . . We hold that EPA has waived this issue. A thorough review of the record reveals no attempt by EPA or its coappellees to object to the transfer when it was made. *Never once* in all its pleadings or briefs before the various courts in this case did EPA ever question the validity of the transfer from Michigan to Illinois. The EPA did not seek review of the transfer order in the Sixth Circuit. *See Illinois Tool Works, Inc. v. Sweetheart Plastics, Inc.*, 436 F.2d 1180, 1187-88 (7th Cir.), *cert. dismissed*, 403 U.S. 942, 91 S.Ct. 2270, 29 L.Ed.2d 722 (1971); *Purex Corp. v. St. Louis Nat'l Stockyards Co.*, 374 F.2d 998, 1000 (7th Cir.), *cert. denied*, 389 U.S. 824, 88 S.Ct. 59, 19 L.Ed.2d 77 (1967); *see also Roofing & Sheet Metal Services, Inc. v. La. Quinta Motor Inns, Inc.*, 689 F.2d 982, 985-87 (11th Cir. 1982). *Nor did it move for retransfer of the matter in the district court* for the Northern District of Illinois. *See Purex*, 374 F.2d at 1000; *Linnell v. Sloan*, 636 F.2d 65, 67 (4th Cir. 1980); *see generally* 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3846 at 359-60 (1986) ("The transfer order is not subject to review by the transferee court or its court of appeals. . . . But an order of transfer is not res judicata. A motion to retransfer the action may be made in the transferee court and the ruling on that motion is reviewable in the court of appeals

> to which the transferee court is responsible.") (footnotes omitted). Consequently, we shall not allow this afterthought to be argued before us now.

881 F.2d 356 (Emphasis added).

Our case is nothing like *National Standard.* In *National Standard*, the appellant "never once" questioned the validity of the transfer, "did [not] move for retransfer of the matter in the district court," and raised the issue of the transfer's propriety for the first time during oral argument on appeal. In our case, however, petitioners filed papers in Louisiana objecting to the transfer; objected to Hillery's motion to dismiss for lack of personal jurisdiction; and then moved to *retransfer* the case as soon as the district court determined that it lacked jurisdiction over Hillery. It is clear the petitioners *never* waived their challenge to the court's jurisdiction over the case.

Respondents' reliance on *Moro v. Shell Oil Company*, 91 F.3d 872 (7th Cir. 1996) and *Krueger International, Inc. v. Blank*, 225 F.3d 806 (7th Cir. 2000) is also wrong.

Moro v. Shell Oil Company involved the court's *denial* of a motion under Fed. R. Civ. P. 59(e) to alter or amend a judgment, made *after* the judgment was entered. The motion was denied because the "new" evidence offered by the plaintiff in support of the motion had been available to him before the judgment was entered.

Likewise, *Krueger International, Inc. v. Blank* is not applicable. In that case the plaintiff filed a motion under Fed. R. Civ. P. 59(e) after the judgment was entered and raised a new theory of the case. The Seventh Circuit, relying on *Moro v. Shell Oil Company*, held that the issued had been waived.

CONCLUSION

The real issue presented by this case is whether 28 U.S.C. § 1406(a) allows the transfer of a case to a transferee court that lacks personal jurisdiction over *all* defendants. This issue is of important concern to the effective administration of justice in the federal courts.

The Seventh Circuit's decision conflicts with a controlling decision of this Court and with decisions of three other circuit courts. This conflict is apt to have continuing future consequences and the Court should take this opportunity to resolve the conflict on this very important issue.

Respectfully submitted,

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